

1 _____ BILL NO. _____

2 INTRODUCED BY _____
3 (Primary Sponsor)

4 A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING AN INSURANCE COMPLIANCE
5 SELF-EVALUATIVE PRIVILEGE; PROVIDING DEFINITIONS; PROVIDING EXCEPTIONS TO
6 CONFIDENTIALITY; AND ESTABLISHING A DISCLOSURE PROCEDURE."

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8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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10 NEW SECTION. **Section 1. Short title.** [Sections 1 through 7] may be cited as the "Insurance
11 Compliance Self-Evaluative Privilege Act".

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13 NEW SECTION. **Section 2. Purpose.** (1) The legislature finds that the protection of insurance
14 consumers is enhanced by insurance companies' voluntary compliance with insurance laws.

15 (2) The legislature further finds that the public will benefit from incentives to identify and remedy
16 insurance compliance issues.

17 (3) The legislature further finds that the limited expansion of the protection against disclosure will
18 encourage voluntary compliance and improve insurance market conduct quality and that the voluntary
19 provisions of [sections 1 through 7] will not inhibit the exercise of the regulatory authority by those
20 entrusted with protecting insurance consumers.

21 (4) The purpose of [sections 1 through 7] is to encourage insurance companies and persons
22 conducting activities regulated under this title to conduct voluntary internal audits of their compliance
23 programs and management systems and to assess and improve compliance with state and federal statutes,
24 rules, and orders.

25 (5) In order to encourage insurance companies to conduct voluntary internal audits, the insurance
26 compliance self-evaluative privilege is recognized to protect the confidentiality of communications relating
27 to voluntary insurance compliance audits.

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29 NEW SECTION. **Section 3. Definitions.** As used in [sections 1 through 7], the following definitions
30 apply:

(1) "Insurance compliance audit" means a voluntary internal evaluation, review, assessment, or audit not otherwise expressly required by state or federal law of:

(a) a company or activity regulated in Montana under this title; or

(b) management systems related to the company or an activity that is designed to identify and prevent noncompliance and improve compliance with statutes, rules, or orders. An insurance compliance audit may be conducted by the company, its employees, or an independent contractor.

(2) "Insurance compliance self-evaluative audit document" or "audit document" means a document or documents prepared as a result of, or in connection with, a completed or ongoing insurance compliance audit. An audit document may include but is not limited to field notes and records of observation, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, phone records, maps, charts, graphs, and surveys, provided that this supporting information is collected or developed for the primary purpose of and in the course of an insurance compliance audit. An audit document may also include any of the following:

(a) an insurance compliance audit report prepared by an auditor, who may be an employee of the company or an independent contractor, that includes the scope of the audit, the information gained in the audit, and conclusions and recommendations, with exhibits and appendices;

(b) memoranda and documents analyzing the insurance compliance audit report and discussing potential implementation issues;

(c) an implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance; or

(d) analytic data generated in the course of conducting the insurance compliance audit.

NEW SECTION. Section 4. Privilege from disclosure -- exceptions. (1) An insurance compliance self-evaluative audit document is privileged information and is not admissible as evidence in any legal action in any civil, criminal, or administrative proceeding, except as provided in [section 6]. Documents, communications, data, reports, or other information created as a result of a claim involving personal injury or workers' compensation made against an insurance policy are not insurance compliance self-evaluative audit documents and are admissible as evidence in any civil, criminal, or administrative proceeding as otherwise provided by applicable rules of evidence or civil procedure.

(2) Except as provided in [section 6], if a company, person, or entity performs or directs the

performance of an insurance compliance audit, an officer or employee involved with the insurance compliance audit may not be examined in any civil, criminal, or administrative proceeding, with regard to the insurance compliance audit or any insurance compliance self-evaluative audit document.

(3) The privilege allowed under this section does not apply to any of the following:

(a) documents, communications, data, reports, or other information required to be collected, developed, maintained, reported, or otherwise made available under this title or any other federal or state statute, rule, or order;

(b) information obtained by observation or monitoring by any regulatory agency; or

(c) information obtained from a source independent of the insurance compliance audit.

NEW SECTION. Section 5. Insurance compliance self-evaluative audit document -- submission to commissioner. (1) A company may voluntarily submit an insurance compliance self-evaluative audit document to the commissioner as a confidential document without waiving the privilege set forth in [section 4] to which the company would otherwise be entitled.

(2) The provisions set forth in 33-1-408 do not apply to an insurance compliance self-evaluative audit document that is voluntarily submitted. The commissioner may not compel a company to involuntarily disclose an insurance compliance self-evaluative audit document.

NEW SECTION. Section 6. Exceptions to confidentiality privilege. (1) The privilege provided for in [section 4] does not apply if it is expressly waived by the company that prepared or caused to be prepared the insurance compliance self-evaluative audit document.

(2) In a civil proceeding, a court may, after a review by the judge in chambers, require disclosure of material for which the privilege set forth in [section 4] is asserted if the court determines one of the following:

(a) the privilege is asserted for a fraudulent purpose;

(b) the material is not subject to the privilege; or

(c) even if subject to the privilege, the material shows evidence of noncompliance with state or federal statutes, rules, and orders and the company failed to undertake reasonable corrective action or eliminate the noncompliance within a reasonable time.

(3) In a criminal proceeding, a court may, after a review by the judge in chambers, require

1 disclosure of material for which the privilege set forth in [section 4] is asserted if the court determines one
2 of the following:

3 (a) the privilege is asserted for a fraudulent purpose;

4 (b) the material is not subject to the privilege;

5 (c) even if subject to the privilege, the material shows evidence of noncompliance with state or
6 federal statutes, rules, and orders and the company failed to undertake reasonable corrective action or
7 eliminate the noncompliance within a reasonable time; or

8 (d) the material contains evidence relevant to the commission of a criminal offense and all of the
9 following factors are present:

10 (i) the commissioner, county attorney, or attorney general has a compelling need for the
11 information;

12 (ii) the information is not otherwise available;

13 (iii) the commissioner, county attorney, or attorney general is unable to obtain the substantial
14 equivalent of the information by any means without incurring unreasonable cost and delay.

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16 NEW SECTION. **Section 7. Disclosure procedure.** (1) Within 30 days after the commissioner,
17 county attorney, or attorney general makes a written request for disclosure of an insurance compliance
18 self-evaluative audit document, the company that prepared the audit document or that caused it to be
19 prepared may file with the court a petition requesting a hearing in the judge's chambers on whether the
20 audit document or portions of the document are privileged under [section 4] or are subject to disclosure.
21 Failure by the company to file a petition waives the privilege.

22 (2) A company asserting the insurance compliance self-evaluative privilege in response to a
23 request for disclosure shall include in its request for a hearing in the judge's chambers all of the information
24 set forth in subsection (5).

25 (3) Upon the filing of a petition pursuant to subsection (1), the court shall schedule a hearing
26 within 45 days of receiving the petition to determine whether the documents are privileged or subject to
27 disclosure.

28 (4) The court, after the review, may require disclosure of material for which the privilege is
29 asserted if it determines that any one of the conditions set forth in [section 6] is applicable to a civil,
30 criminal, or administrative proceeding. Upon making the determination, the court may compel the

disclosure of only those portions of an insurance compliance self-evaluative audit document relevant to the issues that are in dispute. Any compelled disclosure may not be considered to be a public document or considered to be a waiver of the privilege for any other civil, criminal, or administrative proceeding. A party unsuccessfully opposing disclosure may apply to the court for an order protecting the document from further disclosure.

(5) A company asserting the privilege in response to a request for disclosure shall provide to the person seeking disclosure the following information:

(a) the date of the insurance compliance self-evaluative audit document;

(b) the identity of the entity conducting the audit;

(c) the general nature of the activities covered by the insurance compliance audit; and

(d) an identification of the portions of the audit document for which the privilege is being asserted.

(6) (a) A company asserting the privilege has the burden of demonstrating the applicability of the privilege. Once the applicability of the privilege has been established, the party seeking disclosure has the burden of proving that the privilege was established in violation of the conditions as provided in [section 6].

(b) The parties may at any time stipulate in proceedings under subsections (4) and (5) to entry of an order directing that specific information contained in a document is or is not subject to the privilege provided for in [section 4].

NEW SECTION. Section 8. Codification instruction. [Sections 1 through 7] are intended to be codified as an integral part of Title 33, and the provisions of Title 33 apply to [sections 1 through 7].

NEW SECTION. Section 9. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 10. Saving clause. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

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